LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 16 1957
JOHN T. FEY, Clerk

No. 195

In the Supreme Court of the United States

October Term, 1957

CITY OF EL PASO, PETITIONER,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, L. D. McCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BERRIS, AND W. L. SUMMERS, TOGETHER WITH THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	3
1. The contracts respecting rights to the use of Rio Grande water	3
2. Quitclaim deed of a right of way for the Franklin Canal	7
3. The proceedings in the District Court and the Court of Appeals	8
Argument	10
Conclusion	13

CITATIONS

Cases:

Helvering v. *Stuart*, 317 U. S. 154	12
MacGregor v. *State Mutual Co.*, 315 U. S. 280	12
Propper v. *Clark*, 337 U. S. 472	12
Spiegel, Estate of, v. *Commissioner*, 335 U. S. 701	12
Texas v. *New Mexico*, 352 U. S. 991	12

435696—57

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 198

CITY OF EL PASO, PETITIONER

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, L. D. McCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS, AND W. L. SUMMERS, TOGETHER WITH THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas is reported at 133 F. Supp. 894. The opinions in the United States Court of Appeals for the Fifth Circuit (Pet. App. 41–57) are reported at 243 F. 2d 927.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1957 (Pet. App. 55). On May 24, 1957, a timely petition for rehearing was denied (Pet. App. 56–57).

The petition for a writ of certiorari was filed on June 17, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner and respondents were empowered to enter into the contracts which are the subject matter of this case, and whether the parties to those contracts are bound by them.

2. Whether the Court of Appeals erred in the construction it placed upon the contract of August 10, 1949, entered into between the respondents and the petitioner in regard to their respective rights to the use of water from the Rio Grande.

3. Whether the contract of August 10, 1949, between the United States and El Paso County Water Improvement District No. 1, and the petitioner—pursuant to which the former withdrew its protest filed with the Texas Board of Water Engineers in opposition to petitioner's application to appropriate rights to the use of water from the Rio Grande in consideration of the petitioner's agreement subordinating its claimed rights to the use of water to those of the United States—is valid and enforceable.

4. Whether the term "maintenance" in a quitclaim deed dated November 9, 1939, from the petitioner to the United States, as that term relates to bridges across the Franklin Canal, requires the replacement of existing bridges kept in good repair.

5. Whether the Court of Appeals erred in deciding that the respective rights to the use of water in the Rio Grande of the petitioner and the United States

were definitely established by the contracts between them, particularly the compromise contract of August 10, 1949.

STATEMENT

This litigation was initiated by the El Paso County Water Improvement District No. 1 (and certain individual plaintiffs) and the United States, respondents here, for the primary purpose of securing declaratory relief respecting the validity and effect of two categories of contracts among the parties: (1) those relating to rights to the use of water from the Rio Grande; and (2) a quitclaim deed containing covenants obligating the United States to "maintain" certain bridges within the municipal area of petitioner.

1. *The Contracts Respecting Rights to the Use of Rio Grande Water.* The United States entered into a contract dated February 18, 1941 (R. I, 400, Pl. Ex. P–27), pursuant to which the petitioner secured a supply of water from the Rio Grande Reclamation Project. That project, situated on the Rio Grande, impounds water in New Mexico for use in that State and in Texas. The contract provides, in relevant part:

> [a] * * * the City * * * needs and desires to procure from the [Rio Grande Reclamation] project water supply a supplemental water supply to meet the present and anticipated future needs of the City * * * and there is available to the City no practicable source of such supplemental water supply other than the said project water supply; * * *
>
> [b] * * * the City for the purpose of securing [from the Project the needed water sup-

> ply] * * * without interference to the water supply of other [El Paso County Water Improvement] District water right lands, proposes to acquire not to exceed two thousand acres of District water right lands, and desires to receive each year from the project water supply an amount of water not to exceed the amount of water which such acquired lands would be entitled to receive from said water supply for the respective year, * * * [R. I, 406, Pl. Ex. P-27.]

Subsequently, by an instrument dated December 1, 1944, petitioner secured from the United States an additional supply of water from the project (R. I, 427).

Petitioner filed on November 1, 1948, with the Texas State Board of Water Engineers, an application to store and divert from the Rio Grande 27,000 acre-feet of water per annum (R. I, 447).

Following petitioner's application to appropriate rights in the Rio Grande, a third contract, dated August 10, 1949, was entered into between petitioner and respondent El Paso County Water Improvement District No. 1 (R. I, 485). That contract was approved by the United States (R. I, 509, 515). It contains the following provisions (R. I, 485–490; see Pet. App. 51–52):

> Whereas, there has been appropriated under the laws of New Mexico and Texas, for and on behalf of the Rio Grande Federal Irrigation Project * * *, comprising lands of the District and the Elephant Butte Irrigation District * * * and the District claims all such appropriations over all of the appropriable waters

of the Rio Grande River for the irrigation of lands in said districts; and,

* * * * *

Whereas, the City has urged a claim in equity against the Rio Grande Project for sewage effluent placed in the Rio Grande River from the City's operation of its sewage and water systems * * *; and,

Whereas, it is the desire of the District and of the City to cooperate to the end of avoiding controversy and litigation between themselves and to settle and compromise their respective claims involving relative rights and priorities of use of the waters hereinabove referred to, * * *.

Now, Therefore, it is agreed: (1) The District, subject to approval hereof by the Secretary of the Interior of the United States, will permit use, by the City, of Rio Grande Project works serving the District lands, for the purpose of this agreement * * * all as determined by the Project Manager of the Rio Grande Project * * *.

* * * * *

* * * It is expressly understood that in executing this contract, or in accepting the benefits thereof, the City shall not be held to have in anywise relinquished, modified or impaired its title to, ownership of, and its right to control and determine the use and disposition of such effluent prior to its discharge into the Rio Grande. It is further understood that after such effluent is discharged into the Rio Grande, it constitutes part of the Project water supply.

* * * * *

In summary, the United States and the El Paso County Water Improvement District No. 1 recog-

nied in the petitioner a secondary and subordinate right to divert water from the Rio Grande when available and surplus; the use under specified conditions of project facilities; the right of petitioner to control the disposition of its sewage effluent, but that once delivered into the Rio Grande, that effluent would constitute a "part of the Project water supply."

The contract of August 10, 1949, also provided (R. I, 490):

> If the City shall elect to prosecute said Application [with the State Board of Water Engineers] to a conclusion, any award or permit granted thereunder * * * shall, by stipulation of the parties hereto filed in said proceeding be made subject to the terms and conditions of this undertaking.

As contemplated by this clause, there was filed on December 1, 1949, with the Texas State Board of Water Engineers a stipulation by petitioner, the El Paso County Water Improvement District No. 1, and the United States, pursuant to which it was agreed that any permit to divert Rio Grande water granted to petitioner "* * * shall stand expressly conditioned by and made subject to the terms" of the contract of August 10, 1949 (R. I, 528, 534).

Predicated upon the contract and stipulation, the United States and the El Paso County Water Improvement District No. 1 withdrew the protest (R. I, 455) to petitioner's application to appropriate water which they had previously filed with the Texas State Board of Water Engineers. The Board was notified of the compromise contained in the contract of Au-

gust 10, 1949 (R. I, 482), and on May 10, 1950, the Board issued to petitioner a permit to appropriate certain rights to the use of the water (R. I, 504, 508).

Thereafter, on June 22, 1950, petitioner and respondent El Paso County Water Improvement District No. 1 contracted that "To avoid any question or controversy, it is agreed that the Permit [based on petitioner's application to appropriate] * * * is subject to the contract of August 10, 1949 * * *" (R. I, 536).

2. *Quitclaim Deed of a Right of Way for the Franklin Canal.* By a quitclaim deed dated November 9, 1939, petitioner conveyed all of its right, title and interest in and to the Franklin Canal to the United States (R. I, 245). That canal is a major component of the Rio Grande Reclamation Project and traverses a large section of the municipal area within the City's boundaries. Contained in the quitclaim deed is the proviso (R. I, 247) that "this conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at the * * * crossings" of the Franklin Canal, all of which bridges are designated in the deed. It was also provided in the quitclaim deed that the obligation of the United States to "maintain" the bridges is contingent upon "appropriations being made therefor by Congress" (R. I, 247). The petitioner reserved "the right to construct and maintain at its own cost and expense * * * additional bridges" across the Franklin Canal (R. I, 247). On the same date as the quitclaim deed, respondent El Paso County Water Improvement District No. 1 obligated itself to provide

funds to "maintain" the bridges whenever Congress did not provide them (R. I, 23).

3. The Proceedings in the District Court and the Court of Appeals. The relief sought by the United States and the El Paso County Water Improvement District No. 1 was to establish their respective rights to the use of water in the Rio Grande and to have determined the validity and effect of the contracts referred to above (R. I, Amended Complaint, 13–49). By way of answer and counterclaim (R. I, 51–79), petitioner contested these claims, and denied the validity of the contracts, deed, and implementing city ordinances; sought recovery of $51,397.69 allegedly due it for the cost of bridges it had built across the Franklin Canal; and sought injunctive relief against the refusal to it of free use of the project facilities.

After a full trial on the merits, the District Court entered an amended and corrected judgment and decree (R. III, 1752). As to the contracts between respondents and petitioner respecting rights to the use of Rio Grande water, the trial court declared (R. III, 1756–1757):

> [a] the contract dated February 18, 1941, * * * is in all respects valid and binding on all of the parties to it;
>
> [b] the contract dated December 1, 1944, * * * is in all respects valid and binding * * *;
>
> [c] the contract of August 10, 1949 * * * is valid and binding on the parties thereto in its aspect as to rental of Project works for use in delivery of water * * *.

In the amended and corrected judgment and decree, the trial court further declared (R. III, 1757–1758) that:

> * * * whenever there is Project water standing or flowing in the Rio Grande * * * and while the * * * [petitioner] continues to discharge the municipal sewage effluent into the river bed [the petitioner] shall have the right and be entitled to take and have by its own means and pay free * * * an aggregate quantity of Project water within a maximum equal to the quantity of sewage effluent being discharged currently into the river bed * * *.

With respect to the rights to the use of water by the United States, the El Paso County Water Improvement District No. 1, and the petitioner, the trial court also held (R. III, 1753–1754):

> * * * the waters of the Rio Grande to which the United States is entitled for the benefit of the Rio Grande Reclamation Project * * * are definitely committed in prior right by the Rio Grande Compact of 1938 between Colorado, New Mexico and Texas * * *. [Petitioner] is entitled to have and use * * * waters from the Rio Grande covered by the Permit issued to it by the Texas Board of Water Engineers, dated May 10, 1950, * * * but the water entitlement of the defendant under said Permit is fully subject to the priority and superiority of the appropriative rights and entitlement held by the * * * United States of America * * *, by force of the Compact and under 'Certified Filing' No. 123, [the latter rights having been purchased many years ago by the United States] * * *.

With respect to the controversy over the condition contained in the quitclaim deed of November 9, 1939, *supra*, p. 7, the court adjudged respondent El Paso County Water Improvement District No. 1 secondarily liable to maintain the bridges across the Franklin Canal:

> and the burden of such maintenance * * * includes any and all reasonable replacements, rebuilding, restoration, enlargement, reinforcement and repairs of said bridges * * *. [R. III, 1760–1761.]

From that judgment and decree the United States and the El Paso County Water Improvement District No. 1 appealed. Petitioner cross-appealed. Affirming the District Court on petitioner's appeal, and reversing on all points upon which the respondents appealed, the Court of Appeals held that (1) the contract of August 10, 1949, "binds the city [petitioner] against, and prevents, the assertion of, the claim it now makes" (Pet. App. 53); and (2) "the word 'maintain' used in the deed [the quitclaim deed of November 9, 1939] under which the United States holds, it is quite plain that, in its common acceptance, it simply did not mean anything like what the [trial] court held that it did" (Pet. App. 48).

ARGUMENT

1. The Court of Appeals properly restricted its consideration to the ordinary principles of contract law which are in themselves sufficient to determine the issues in this case. The court correctly decided that it was unnecessary to venture into the field of State-Federal relationship respecting rights

in interstate streams or to undertake a review of the complex questions presented by petitioner in regard to the Rio Grande Compact or the authority of the State of Texas to control all of the waters within its boundaries. Rather, the court simply decided that:

(a) Petitioner and respondents alike were empowered to execute the contracts of February 18, 1941, December 1, 1944, and the contract of August 10, 1949, and that all the parties were bound by them;

(b) The agreement by respondents to withdraw their protest before the Texas State Board of Water Engineers constituted an adequate consideration to support the contract pursuant to which petitioner subordinated its right to those of respondents;

(c) It was error for the trial court, when sustaining the validity of the contract of August 10, 1949, regarding the use of project facilities, to rewrite the contract, in effect, by permitting the petitioner to exchange "sewage effluent" for project water although the contract does not so provide; and

(d) It was error for the trial court to read into the word "maintain," as used in the quitclaim deed of November 9, 1939, from petitioner to the United States, an obligation on the latter to include "any and all reasonable replacements, rebuilding * * * and repairs of said bridges * * * [to keep them] adequate for the present and future needs of all common traffic * * * whatever the growth in such traffic density over the years * * *."

These sound rulings are all based upon the particular terms of these particular contracts and the other

instruments. There is no need for further review by this Court. Insofar as the rulings rest on Texas law, no sufficient reason is put forth for overruling the views on Texas law of the Court of Appeals for the Fifth Circuit, speaking through Chief Judge Hutcheson. See, *e. g.*, *MacGregor* v. *State Mutual Co.*, 315 U. S. 280; *Helvering* v. *Stuart*, 317 U. S. 154, 164; *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707–708; *Propper* v. *Clark*, 337 U. S. 472, 486–487.[1] Insofar as federal contract law may be involved, the issues are clearly too narrow and special to call for consideration by this Court.

2. Petitioner seeks needlessly to inject into the case broad questions as to the effect of the Rio Grande Compact (Pet. 3, 11, 14ff) which are not truly presented and should not be decided in this litigation. If petitioner's contentions were accepted, it would call for a full review of the compact involving the three States of Colorado, New Mexico, and Texas. Resolution of the basic questions petitioner unjustifiably raises would require the presence of these States, at least of New Mexico and Texas, assuming jurisdiction could be found over them in the trial court. Thus, petitioner seeks review of matters concerning which jurisdictional objections would necessarily be interposed because of the want of indispensable parties. Cf. *Texas* v. *New Mexico*, 352 U. S. 991.

[1] The ample support in Texas law for these rulings is shown in the Brief in Opposition for All Respondents Except the United States of America, at pp. 10–12, 29, 31–33, 34–35, 37–38, 39.

Since the whole controversy can be, and has been, resolved within the narrow scope of contract law, it is entirely unwarranted to open up the broad and fundamental issues petitioner unnecessarily raises.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

August 1957.